FOR ARGUMENT

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IN THE

Supreme Court of the United States

October Term, 1978

Nos. 78-1088 and 78-1217

HENRY A. KISSINGER,

Petitioner,

v.

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *et al.*,

Respondents.

and

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *et al.*,

Petitioners,

v.

HENRY A. KISSINGER,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER AND CROSS-RESPONDENT HENRY A. KISSINGER

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I. THE REQUESTERS' COMPLAINTS SHOULD HAVE BEEN DISMISSED FOR FAILURE TO STATE A CAUSE OF ACTION UNDER THE FREEDOM OF INFORMATION ACT, BECAUSE FOIA APPLIES ONLY TO RECORDS IN THE CUSTODY OR CONTROL OF AN AGENCY.

A. Introduction

At issue in this case are rough, unedited notes of Dr. Kissinger's telephone conversations, made when he was a Presidential Assistant and Secretary of State, which he donated to the United States and lodged in the Library of

Congress shortly before he left office.[1] After the transfer, the private respondents ("requesters") sought these notes under the Freedom of Information Act as State Department "agency records" which they say Dr. Kissinger had no power to relinquish and the Library had no power to receive. They ask that the notes be returned to the agency from which they were "unlawfully removed."

The first question is whether requesters are the proper parties to assert such claims. The situation is anomalous:

> The disputed telephone notes are in the possession of the Library of Congress. They are the property of the United States . . . . The Library of Congress desires to keep the notes; the State Department, so far as this record discloses, does not want them back. Fed. P. Br. 17-18.[2]

What rule of law entitles members of the general public to demand that a court "order the notes transferred from an institution that wants them to an instutition that does not"? *Id.* at 18.

[1] At issue in No. 78-1088 are notes made when Dr. Kissinger was Secretary of State; No. 78-1217 relates to the notes made when Dr. Kissinger was a Presidential Assistant. If this Court reverses in No. 78-1088, it must necessarily affirm the decision below in No. 78-1217. We believe the additional issues raised in No. 78-1217 have been adequately treated in our main brief, and thus limit this Reply to the questions presented in No. 78-1088.

[2] "Fed. P. Br." refers to the Brief for the Federal Parties filed herein. Other references are to the Brief for Respondents and Cross-Petitioners Reporters Committee for Freedom of the Press, *et al.* ("RCFP Br."), the Brief for Respondents Military Audit Project, *et al.* ("MAP Br."), the Brief for Petitioner and Cross-Respondent Henry A. Kissinger ("Kissinger Br."), and the Appendix to the Petition for a Writ of Certiorari filed in No. 78-1088 ("Pet. App.").

Requesters rely on FOIA. But FOIA only permits a district court to enjoin an "agency" from "withholding" "agency records." Requesters say this language must be read to mean that federal agencies have an affirmative responsibiltity to produce all "records" requested by members of the public; that his duty extends to documents, *wherever located,* which conform to the legal description of "agency records"; that FOIA empowers district courts, independently, to decide whether documents *not in the possession of an agency* meet that description; and that, if the court finds such documents are "records", it has jurisdiction under FOIA to order a non-agency custodian to return the "records" to the agency.

Here the State Department itself determined that the notes, which had been treated and filed as personal from the time they were originated, were not records. The official records of Dr. Kissinger's oral commitments and decisions were comprised of other memoranda and papers contemporaneously made and filed when his conversations were followed up and implemented. In addition, the notes were later reviewed and extracts or summaries made as necessary to supplement the already existing records. The Department permitted Dr. Kissinger to transfer the notes to security-approved facilities at the Library of Congress as part of a process worked out by the Department's chief legal and administrative officers to assure that the transfer complied with Department policies and regulations relating to the removal of papers by retiring officials. Those procedures were adopted, approved and implemented, and the notes transferred to the Library, *before* the FOIA requests at issue here were filed with the Department.

Requesters seek judicial review of the Department's determination that the notes were not "records," and an order directing Dr. Kissinger and the Librarian to return the notes to its custody. The District Court granted that relief. Since FOIA does not provide for such relief, the effect of the decision was to grant a private right to enforce the records retrieval provisions of the Federal Records Act (44 U.S.C. § 3106) even though it is clear that no such right can be implied. *See* Kissinger Br. 23-24; Fed. P. Br. 26-34. And the court granted this right to litigants who expressly disclaim reliance on the Federal Records Act as the basis for their claims. RCFP Br. 95; MAP Br. 17. This was error.

B. Neither FOIA Nor Any Other Law Gives Requesters The Right To Sue Dr. Kissinger Or The Librarian of Congress.

Requesters do not contend that FOIA or any other law gives them a right to sue Dr. Kissinger or the Librarian for return of the notes. They argue instead that FOIA provides the basis for ancillary relief against non-agency custodians of "unlawfully removed agency records" when the agency defendant could but does not act to recover the "records." Their theory is that district courts have authority, either by exercise of their inherent powers as courts of equity or by use of the extraordinary powers conferred by the All Writs Act, 28 U.S.C. § 1651(a), to require non-agency parties to perform such acts as may be necessary "to effectuate the policy of and to grant a complete remedy to enforce the FOIA." MAP Br. 20; *see also* RCFP Br. 95-97.

We agree that a federal district court may exercise its inherent equitable powers to enforce the FOIA, *Renegotiation Board v. Bannercraft Clothing Co.*, 415 U.S. 1, 19 (1974), and that it possesses the power

> to issue such commands under the All Writs Act as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued *in its exercise of jurisdiction otherwise obtained. United States v. New York Telephone Co.*, 434 U.S. 159, 172 (1977).

The controlling language is underscored. Procedural remedies, whether equitable or legal in their historical origin, cannot be used to extend the scope of substantive legal rules. *See Commercial Security Bank v. Walker Bank & Trust Co.*, 456 F. 2d 1352 (10th Cir. 1972); *Doyle v. Milton*, 73 F. Supp. 281, 284-85 (S.D.N.Y. 1947).

C. The State Department Did Not Violate FOIA: FOIA Does Not Require Agencies To Institute Retrieval Actions In Order To Comply With Information Requests.

Ancillary relief against Dr. Kissinger and the Librarian could not under any theory be justified in the absence of a finding that the *State Department* violated the FOIA. Although the District Court's opinion contains no such finding, requesters suggest this Court can remedy the deficiency by holding that

> when an agency refuses to regain custody over documents that are its records and remain subject to its legal control, it is "withholding" those records in violation of the Act and the courts have jurisdiction to require an appropriate remedy. RCFP Br. 82-83. *See also* MAP Br. 16.

They further suggest that an agency has "legal control" over records it does not possess if it might secure them by

legal action against the custodian. RCFP Br. 92; MAP Br. 16.

Requesters' case is that an agency "legally controls" what it could seek by suit, and that a failure to sue for records constitutes a "withholding" within the meaning of 5 U.S.C. § 552(a)(4)(B). These are not the usual meanings of "control" and "withheld". In ordinary speech, a person does not "withhold" something which he neither possesses nor controls, nor does he "control" that which he cannot possess without resort to legal process. To "withhold" is to "desist or refrain from granting, giving, or allowing: keep in one's possession or control: keep back." The synonym of "withhold" is "keep". Webster's Third New International Dictionary (1976).[3]

There is nothing in the Act's legislative history to indicate Congress intended "withhold" to imply a duty to institute possessory actions in order to comply with a request for access to agency records. The principal impetus for the Act's passage was Congress' belief that the former "public information" section of the Administrative Procedure Act gave agencies too much discretion to withhold from the public "matters of official record". From the beginning, the focus of the new legislation was to limit the agencies' discretion to withhold information they had but were reluctant to release. *See, e.g.*, S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965). Questions relating to an agency's duty to create, or retain, or retrieve, records did not enter

[3]It is, in fact, difficult to speak of "withholding" without at the same time referring to "possession". *See N.L.R.B. v. Robbins Tire and Rubber Co.*, 437 U.S. 214, 221 (1978) ("FOIA requires that records and material *in the possession of federal agencies* be made available on demand to any member of the general public.") (emphasis added)

into the discussions because these matters were governed by the entirely separate provisions of the Records Disposal and Federal Records Acts. 44 U.S.C. §§ 2101 *et seq.*; 3301 *et seq.* *See* Fed. P. Br. 35-37.

FOIA creates an exception to the standing requirements and other limitations on review of agency action imposed by the Adminstrative Procedure Act. The notion that Congress intended an exception it created for a specific purpose to serve as a vehicle for unrestrained judicial review of agency recordkeeping decisions defies logic and common sense. FOIA authorizes district courts to enjoin agencies from withholding agency records; it does not authorize courts to order agencies to procure records they do not have or to order non-agency defendants to deliver records to agencies so the agencies can produce them. The District Court should have dismissed requesters' complaints for failure to state a claim upon which relief could be granted.

II. EVEN IF FOIA APPLIES TO DOCUMENTS NOT IN THE CUSTODY OR CONTROL OF AN AGENCY, THE NOTES ARE NOT "AGENCY RECORDS" SUBJECT TO FOIA.

If the Court decides that requesters had no legal right under FOIA to compel the State Department to retrieve the notes, it need proceed no further. Otherwise, it must review the correctness of the lower courts' decisions that, contrary to the Department's own view, the notes are the Department's "agency records".

A. Requesters' Analyses Of The "Agency Records" Issue Are Unsupported By Precedent And Contrary To Law.

The MAP requesters' analysis has the virtue of simplicity. They argue that FOIA requires the production of "information," and that

> the simple test of the FOIA is that agency records include any papers dealing in whole, and that portion of papers dealing in part with "public business"; papers reflecting "in detail the activities of government," papers whose disclosure will let the "people . . . know what their government is doing." MAP Br. 25.

By this test the notes – or at least those "portions of the notes which record government business," *id.* at 27 – would be "agency records". So, too, would be virtually every piece of paper generated by government employees, the great bulk of which is routinely discarded. So, too, would be many of the supposedly private papers donated over the years by former government officials to public and private institutions.[4]

[4]The MAP requesters attempt to limit the extraordinary reach of their argument by suggesting it would apply "only for officials of petitioner's rank," to assure that "decisions respecting the disposal of original records of government business may not be made by them for their own benefit." MAP Br. 28. No authority is cited – and there is none – for the extraordinary proposition that different rules apply to different government employees depending upon their rank. The difficult underlying problem, however, is what records are personal. The General Services Administration reports that

> [t]here is no established government-wide definition of personal records. . . . Personal records are presently considered to be simply those records which are not official . . . . *Compliance with GSA regulations regarding maintenance, protection, and disposition of records by senior officials is ultimately the decision of the senior official himself.* A. 216a (emphasis added).

This is true of other agencies as well. *See, e.g.*, A. 227a ("It has been customary for [Federal Trade] Commissioners and other agency employees to remove papers *they consider personal* from their files at the time they leave the agency.") (emphasis added)

The RCFP requesters' more elaborate presentation reaches essentially the same conclusion. They argue that

> a document must be considered a 'record' . . . unless it has *no conceivable value* as evidence of government activities and operations. RCFP Br. 40 (emphasis added). *See also id.* at 30, 63.

This argument is based on a construction of the Records Disposal and Federal Records Acts and is even more mischevious. It would subject virtually all documents having "value as evidence of agency affairs" (*id.* at 24) to the disposal procedures set forth in the Records Disposal Act. This, of course, is its intention, for the RCFP requesters' basic premises is that

> [n]o agency has discretion to reclassify a document which *does* have such evidentiary value as a 'non-record.' *Id.* at 24 (emphasis in original). *See also id.* at 30, 41 n.35, 44.

The District Court granted summary judgment for requesters on the theory that *as a matter of law* the notes made when Dr. Kissinger was Secretary of State were "unlawfully removed agency records." The RCFP argument is thus an effort to salvage the summary judgment obtained below. They seek to persuade this Court that the State Department lacked discretion to determine whether the notes were records or to permit them to be transferred to the Library. But this position simply has no basis under existing law.[5]

[5]Another example of error in the RCFP brief is the assertion that transfer of the notes to the Library violated the terms of the Separation Statement (Form JF-3) which Dr. Kissinger signed upon leaving

The history of the Records Disposal Act makes clear that this legislation places "responsibility in the first instance upon the agencies for determining what documentary materials should and what should not be preserved" as records. H.R. Rep. No. 559, 78th Cong., 1st Sess. 1 (1943). Agencies must and do exercise this responsibility – which includes discretion to allow employees to retain materials the agencies do not need as "records" – without seeking or being required to seek the prior approval of the Administrator of General Services. *See* Kissinger Br. 23-39; Fed. P. Br. 22, 27-28, 39, 43.[6]

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office. RCFP Br. 68-72. That form requires a departing official to affirm that he has "surrendered to responsible officials all classified or administratively controlled documents and materials" which he had in his possession, and that he is not retaining any such materials – "including any diaries, memorandums of conversations, or other documents of a personal nature." A. 255a. What the RCFP requesters overlook is that the form Dr. Kissinger signed was expressly made "[s]ubject to the Memorandum dated November 1976, entitled 'Donation Procedures.' " *Id.* That memorandum authorized transfer of classified documents to security-approved facilities at the Library. A. 253a. It also stated that the contents of Dr. Kissinger's personal files could be transferred to the Library. A. 252a. Each of the Department officials who signed the memorandum knew the notes were in Dr. Kissinger's personal files. A. 260a. When Dr. Kissinger actually signed the Separatement Statement at the end of his term of office, the notes were already safely lodged in the Library's approved facilities. A. 249a.

[6]Agencies are not, of course, free to discard important documentary evidence of their "organization, functions, policies, decisions, procedures, and essential transactions" (44 U.S.C. § 3101) by the simple expedient of treating such papers as "non-record materials." The scheme of the federal records management laws contemplates close cooperation between the agencies and the Administrator to assure that the sometimes conflicting objectives of the federal records management program are met. *See* 44 U.S. §§ 2904(2), 3102(2); Fed. P. Br. 28 n.17. This scheme also provides a remedy in cases where the Administrator believes an agency is not living up to its recordkeeping

B. The Notes Are Not "Agency Records" Under Any Theory: The State Department Properly Relinquished The Notes To Dr. Kissinger Before The FOIA Requests Were Filed.

The federal parties call for dismissal of the complaints on the ground that FOIA does not support the relief granted below, but suggest that if the "records" issue is reached the evidentiary record must be supplemented before that issue can be decided. Fed. P. Br. 39, 58. We agree that the evidentiary record is insufficient to support *affirmance* of summary judgment against Dr. Kissinger. We believe, however, that it is fully sufficient to support a judgment of dismissal.

The federal parties posit a three-part scheme in which the notes could be "records" or "non-record materials" or "personal papers" depending upon the circumstances. Fed. P. Br. 21-22. The Records Disposal Act applies only to documents the State Department treats as "records," a matter the agency itself has discretion to determine. *Id.* at 27-28.[7] "Non-record materials" are documents which

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responsibilities. He may, if informal methods fail and he regards the issue as important, "submit a written report of the matter to the President and the Congress." 44 U.S.C. § 2111(b).

An underlying issue in this case is whether members of the general public should be permitted to involve the federal court system if they question an agency's recordkeeping management procedures. The discussion in Part II of this Reply assumes that this Court, if it rejects the arguments presented in Part I, would allow such involvement. We submit that the essentially political nature of the remedy contemplated by 44 U.S.C. § 2111(b) makes clear that Congress never anticipated agency recordkeeping practices would be subject to judicial review of any kind – much less to review under FOIA. *See* Kissinger Br. 26-27.

[7]The notes were never official State Department records. Official records of the Department are designated and filed as such in its centralized or authorized decentralized files. Department of State, *Records Management Handbook* ("Handbook") ¶¶ 230, 240 (1968). The notes were not, nor were they required to be, so filed.

under the Department's records management program are not required to be retained as "records." *Id.*at 28, 41. The State Department had discretion to surrender such materials to Dr. Kissinger. *Id.* at 43-44. *See also* Kissinger Br. 38-39.

It is unnecessary to question the statutory basis for this analysis or to explore the many difficult problems to which it would give rise — because any notes that were not Dr. Kissinger's "personal papers" when they were created certainly became his "personal papers" when the Department properly relinquished the notes to him for transfer to the Library. Fed. P. Br. 22, 43-44.[8]

Dr. Kissinger had no duty to create the notes. Fed. P. Br. 31 n. 20, 46-47. His duty under the Department's rules was to see to it that his oral "decisions, commitments and discussions of any significance" were "made a matter of record." 5 FAM § 423.2-1. This he did — not with the notes but with the official correspondence, memoranda and other documents contemporaneously generated as a result of the follow-up and implementation of his oral actions and commitments and filed at that time as the

[8]For example, the federal parties suggest FOIA might apply not only to "records" as defined by the Records Disposal and Federal Record Acts but also to a broader category of government "materials" — *if* the agency has and can readily locate such materials. Fed. P. Br. 49-52. This theory, which appears to be of very recent origin, is not a matter they saw fit to raise in either court below. We do not address it here because the notes *were* relinquished and it is thus unnecessary to decide what they might have been before the relinquishment took place. In any event, we think the federal parties have themselves explained why it would be both legally questionable, and impractical, to apply their theory to materials that are not "records" within the meaning of the agencies' records management programs. *See* Fed. P. Br. 49 n.38.

records of his official transactions. *See* Kissinger Br. 5 n.6; A. 86a ("extensive 'memoranda of conversations' covering talks between Kissinger and foreign and U.S. leaders are part of this official file.").[9]

When the question of the notes' status was first raised in January 1976, the Department's Legal Adviser orally advised Dr. Kissinger the notes were *not* State Department records. A. 259a. Later, when plans for the donation were being developed, that advice was reaffirmed and given to him in writing as a formal legal opinion. The Legal Adviser confirmed that Dr. Kissinger had no duty to create the notes. He observed that the notes contained information of a personal nature, that they had not been circulated

[9]The notes were *not* made for the purpose of complying with 5 FAM § 423.2-1:

> My purpose in causing the notes to be made was to create a rough record of those of my daily telephone conversations to which I or my immediate staff might wish to refer in order to follow up on matters discussed orally . . . . [T]he notes served as work aids to ease the administrative burdens of my office . . . . The notes had no other function, and were used for no other purposes. A. 244a-45a.

The documents produced by the follow-up actions, not the notes, were the "records" of Dr. Kissinger's oral actions, decisions and significant discussions. *See* A. 167a. For this reason, he "always regarded the telephone transcripts as work aids which I could retain or discard as I chose." A. 245a. This is consistent with the Department's requirement that "working papers" "should be disposed of as soon as they have served their purpose." Handbook ¶¶ 271, 272. The prescribed method of disposition is by destruction or sale as scrap paper or "some other manner that is consistent with . . . security requirements." *Id.* at ¶ 933. Dr. Kissinger did not, as he might have, destroy the notes after the follow-up actions were taken but instead placed them in personal files in his office and, later, in the Library of Congress — methods "consistent with . . . security requirements."

within any agency,[10] that they had been expressly designated and filed as personal from the time they were originated, and that they were "retained solely at your discretion as work aids to help you recall prior conversations and events." A. 81a, 83a. Since there was case law and other "recent authority [to] support the view that such papers are personal rather than agency records," and since under 5 FAM § 417.1a "a retiring official may retain papers expressly designated or filed as personal from their time of origin or receipt," A. 81a, the Legal Adviser concluded

> it is my opinion that under Department of State regulations and other legal criteria, these particular papers are personal and may be retained by you when you leave office. A. 84a.

The Legal Adviser also specifically addressed the notes' relation to Dr. Kissinger's duty to document his oral transactions. Based on his knowledge of the manner in which the notes had been used and kept, he said it was "highly probable" that any decisions and policy actions reflected in the notes

> would have been incorporated in other papers at the time the decisions were implemented – and those latter papers would certainly have become government records. A. 82.

However, he recommended, "as a precaution" to "assure that government records are complete," that Dr. Kissinger

[10] The federal parties and the RCFP requesters assert that the notes were "circulated." *See* Fed. P. Br. 41 n.29; RCFP Br. 76. The facts are that the notes never left Dr. Kissinger's office; they were not available to Department employees generally; only Dr. Kissinger's Executive Secretary and Senior Special Assistant ever saw them. A. 245a-46a. *See* note 15, *infra*.

review the notes and make extracts of any discussions of significant "government decisions or policy actions" not otherwise reflected in the official files. A. 82a; *see* 259a-60a. This recommendation derived from the Department's view that extracting

> in practice . . . is applied to papers containing a discussion of Department activities or decisions not otherwise reflected in existing Department records. A. 204a.

Although the Legal Adviser's opinion makes clear that Dr. Kissinger could have made the extracts himself,[11] he entrusted the task to the Deputy Undersecretary for Management, Lawrence M. Eagleburger, whom he chose

> because he had worked with me during most of the time I had been in government, was familiar with my activities, and therefore could identify the portions of the notes appropriate for extracting. A. 248a.

Dr. Kissinger asked Mr. Eagleburger to read the notes and "extract everything he believed was necessary in order to comply with the regulations and Mr. Leigh's advice." *Id.* This was done, and the extracts are now in the Department's files. *Id.*

[11] The Department's view is that "papers designated and filed as 'personal' at the time of origin or receipt are presumed to be papers in which the individual has the dominant interest – and thus may retain." A. 204a. Extracting is one of the means used to protect "the right of a government employee to retain papers of a personal nature or those prepared with the expectation of privacy." A. 199a. Given its purpose, extracting is of necessity a function to be performed by the person whose privacy is to be preserved.

The federal parties agree that the Legal Adviser's construction of the Department's recordkeeping rules was basically correct. *See* Fed. P. Br. 31 n.20, 48. They also agree that the District Court was bound to defer to the Legal Adviser's construction unless it was "plainly inconsistent with the wording of the regulations." *United States v. Larionoff*, 431 U.S. 864, 873 (1977); *Udall v. Tallman*, 380 U.S. 1, 16 (1965). Their concern is that they cannot now determine with certainty whether the extracts were "sufficient to satisfy this construction of the [Department's] records management program." Fed. P. Br. 48.[12]

We think the federal parties have misconstrued the Legal Adviser's opinion. That opinion did not *require* that extracts be made in order to satisfy Dr. Kissinger's duty to document his oral transactions. It recognized that ample documentation already existed, and simply recommended a further review "as a precaution" to "assure that government records are complete." A. 82a. Whether this was done, or how well it was done, was not a condition of the Legal Adviser's conclusion that the notes then were and had always been personal papers.

[12] The federal parties assume the matter of the extracts' adequacy could be resolved simply by comparing the notes with the extracts. Fed. P. Br. 23-24, 48. But the notes are not the only official records of Dr. Kissinger's oral decisions, commitments and significant discussions. They merely supplemented the records already made – "a very large and undifferentiated volume of material." A. 79a. If the question is whether the notes still contain significant information not already reflected in the official records, that question can only be resolved by comparing the notes both with the extracts *and* with the entire corpus of official records relating to Dr. Kissinger's administration. We leave it to the federal parties to explain how a court could manage – and why it should undertake – such a monumental undertaking.

We think it is clear in this case that the Department relinquished the notes before requesters demanded FOIA access to them. And the record before this Court demonstrates that the decision to relinquish the notes was not arbitrary, capricious, an abuse of discretion, or contrary to law. Application of that standard here obviates the need for further proceedings in this case. The District Court could and should have rendered summary judgment in Dr. Kissinger's favor.

III. THE DISTRICT COURT'S INSPECTION ORDER IS UNCONSTITUTIONAL.

Whether the District Court's inspection order is valid under the Constitution need not be determined unless this Court concludes, *first*, that requesters stated a cause of action under FOIA and, *second*, that the courts below correctly held, as a matter of law, that all the notes were "unlawfully removed agency records." If the Court does so conclude, it should nonetheless reverse and remand with instructions to conform the order to constitutional requirements.

The courts below assumed that requesters could invoke the District Court's "broad equitable powers . . . to order the return of wrongfully removed agency documents where a statutory retrieval action appears unlikely." Pet. App. 55a. *See* 44 U.S.C. § 3106. On that assumption, requesters, as the State Department's surrogates, would have no greater rights in any such retrieval action than the Department. Certainly, the Department would not be entitled to seize and read the contents of Dr. Kissinger's personal files to determine whether those files contain documents subject to its retrieval claims. The District

Court's order creates for requesters inspection rights the Department could not have asserted itself. [13]

The inspection order can be justified only if *all* the notes are "records." Yet all the parties agree that some, by any definition, are "personal papers" to which they have no claim. RCFP Br. 120; MAP Br. 27, Fed. P. Br. 43 n.30. Any conclusion that all the notes are subject to inspection requires an assumption that Dr. Kissinger lost his privacy rights by "intermingling" personal papers with agency files. *Cf.* 5 FAM § 417. lb. What happened here is the *opposite* of that kind of "intermingling." Dr. Kissinger kept the notes in *personal* files, not agency files, and treated them as *personal* papers, not agency records. [14] If this was

[13] The irony is that the federal parties believe a considerable portion of the notes would, under any theory, not be "records" subject to a retrieval action the Department might institute. Fed. P. Br.38 n.25. The result of the order below, therefore, is to require the Department to inspect papers it does not believe it has the authority to see. The federal parties say the inspection would be constitutional – *provided* this Court holds the notes must be returned to the Department because

> the Department not only has a right of access to the *portions* of the notes that deal with public business *but also never should have let the notes leave the building*. Fed. P. Br. 57 (emphasis added).

Unless the Court so holds, the federal parties concede the inspection is impermissible. And they explain elsewhere in their brief why no such holding is possible. *Id.* at 39-52.

[14] "Intermingling" also occurred in the sense that the notes reflect personal as well as government matters where such matters were discussed in the same conversations. This was unavoidable, given the circumstances under which the notes were made. A. 245a. To say that this kind of "intermingling" converts the notes into public documents as to which no privacy expectations can attach turns the idea of "intermingling" on its head. If Dr. Kissinger had viewed the notes as public documents, he simply would not have made or kept them. A. 246a. That he did keep the notes – in private files – does not mean they can now be summarily seized and read on the bland assumption that the personal matters they contain have somehow become the public's business.

an error, it certainly did not constitute a voluntary surrender of Dr. Kissinger's privacy rights. [15]

There is no constitutional procedure for allowing an adverse party to inspect papers as to which a claim of privilege is made in order to determine whether the privilege exists. Certainly *Nixon v. Administrator of General Services,* 433 U.S. 425 (1977), is not such a precedent. *Nixon* sustained archival screening procedures prescribed by a special statute enacted as an emergency measure, but only because the inspection procedures the

[15] Nor did Dr. Kissinger relinquish his privacy rights by permitting his Executive Secretary and Senior Special Assistant to read the notes for the purpose of making extracts. As this Court has observed in another context,

> it is literally impossible, in view of the complexities of the modern legislative process, with Congress almost constantly in session and matters of legislative concern constantly proliferating, for Members of Congress to perform their legislative tasks without the help of aides and assistants;...the day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter ego.... *Gravel v. United States,* 408 U.S. 606, 616-17 (1972).

Dr. Kissinger did not forfeit his legitimate privacy expectations when he entrusted another to act as his "alter ego" in making extracts he could have made himself. A limited waiver of privacy for a limited purpose is "not the same as an agreement to accept rummaging by the world at large." *Forsham v. Califano,* 587 F.2d 1128, 1137 (D.C. Cir. 1978), *cert. granted,* No. 78-1118 (May 14, 1979).

statute mandated were the sole practical means of protecting national interests of overriding importance. *Id.* at 454-65. *See* Kissinger Br. 47-48. Privacy rights may not be absolute, and in an appropriate case may perhaps be subordinated to governmental interests of overriding importance, but the desire of private litigants to read the notes – or such portion of the notes as would be available to them under FOIA – does not qualify as an overriding governmental interest.

The ultimate justification for the inspection order is the disingenous suggestion that "processing of Kissinger's notes is no more offensive than the processing of Nixon's materials." Fed. P. Br. 56. We are disturbed that the Department of Justice appears willing to tolerate invasions of privacy if the methods used are "no more offensive than" one other invasion of privacy this Court, reluctantly, allowed once. The emergency that gave rise to Congress' decision to assert dominion over the former President's papers was the product of a constitutional crisis which shook this nation to its foundations. The result, however necessary, must have been distasteful to every member of the Congress as well as to every member of this Court. To suggest that *Nixon* can be taken as a general model for resolution of privilege claims in civil litigation – and this FOIA case is no more than a garden variety dispute about papers the private respondents would like to read – is a travesty.

IV. CONCLUSION

The Court has been apprised that the Archivist of the United States disagrees with the Legal Adviser's construction of the State Department's records management regulations. Fed. P. Br. 23. That dispute, so far as we are aware, continues.[16] The result here is that the MAP and RCFP requesters serve as advocates for the Archivist's views, Dr. Kissinger supports what he believes are the views of the State Department, and the Department of Justice has been obliged to represent all the federal parties – the Archivist, the State Department *and* the Librarian of Congress – in the posture of a beleagured *amicus curiae.*

There is no occasion for this Court to resolve the interagency difference which lies behind and distorts the issues in this case. If the Archivist is dissatisfied, he has his remedy. See note 6, *supra.* And the State Department has its remedy. 44 U.S.C. § 3106. But the requesters' efforts to make capital out of an intramural dispute by reading into

[16]The underlying nature of the dispute relates to the Archivist's efforts to inspect papers the State Department has determined are not its records. *See* A. 47a-48a; 88a-97a; A. 99a-116a. The Archivist, who has jurisdiction over agency *records disposal* decisions, seeks jurisdiction over agency *records creation* decisions as well. Although the brief it has filed in this case never explicitly so states, it is nonetheless clear that the Justice Department does not accept the Archivist's assertion of authority over the agencies' records creation decisions.

FOIA a remedy given by the Federal Records Act to the State Department and to the Attorney General must fail. This case should be resolved by an order to dismiss the requesters' complaints.

Respectfully submitted,

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